NO. 21042 ✓

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOUISE LEE, LAWRENCE LEWIS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FILED

DEC 22 1966

WM. B. LUCK, CLERK

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellants to be guilty as charged in a one-count indictment following trial by jury.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellants were tried under the one-count indictment which alleged that appellant Lewis knowingly concealed, and facilitated the transportation and concealment of, approximately six ounces of cocaine and one ounce of heroin, narcotic drugs, which, as he then and there well knew, had been imported and brought into the United States contrary to law. The indictment also alleged that appellant Lee knowingly aided, abetted, assisted, counseled, induced and procured the commission of that offense [C. T. 2]. 1/

Jury trial of appellants commenced on February 1, 1966, before United States District Judge James M. Carter [R. T. 2]. 2/ Appellants were found guilty as charged on February 2, 1966 [R. T. 218-19].

Thereafter, on March 7, 1966, appellant Lee was committed to the custody of the Attorney General for treatment and supervision as a Youth Offender, until discharged by the Board of Parole. Appellant Lewis was sentenced to seven years in prison on the same date [C. T. 15-16].

Appellants thereafter filed timely notices of appeal [C. T. 17-18].

1/ "C. T." refers to the Clerk's Transcript of Record.

2/ "R. T." refers to the Reporter's Transcript. The Reporter's Transcript of proceedings at the hearing on Motion to Suppress Evidence will be separately designated.

III

ERROR SPECIFIED

Appellants specify the following points upon appeal:

1. Alleged error in the ruling that appellant Lee had no standing to object to a search.

2. Alleged insufficiency of the evidence as to Lee.

3. Alleged error in denying appellant Lewis's Motion to Suppress Evidence.

IV

STATEMENT OF THE FACTS

A. The Motion to Suppress Evidence.

On October 8, 1965, United States Customs Agent Thaine Ellis was informed by Leobardo Sandoval that a 1955 Ford bearing California license GNP 408 would be used to transport a quantity of narcotics into the United States from Mexico [M. S. 18-19, 21, 23-24].[3/]

Sandoval had been very reliable as an informant in the past and had provided information resulting in arrests upon three separate occasions:

[3/] "M. S." refers to the Reporter's Transcript of Proceedings at the hearing of the Motion to Suppress Evidence.

"THE COURT: The information given on these occasions checked out?

"THE WITNESS: Right down to the line, yes, sir." [M. S. 31].

On the following day, October 9, Sandoval informed Ellis that the vehicle would cross the line after 10 o'clock in the morning. At about 11:45 on the same date Ellis was informed by an officer at the port of entry that he had stopped the vehicle and sent it to the secondary inspection area. Ellis ordered that there be no search in the secondary area and also asked Supervisory Customs Port Investigator Gore to follow the vehicle when it left the secondary area [M. S. 19-20, 24].

Ellis was in radio communication with Gore as the latter followed the vehicle. Gore informed him that he, Gore, was being followed by a 1963 Buick with Nevada license plates. He gave the license number to Ellis [M. S. 20].

Ellis subsequently observed the 1955 Ford and talked to the driver, who was Sandoval. Sandoval advised Ellis that he, Sandoval, was to park the Ford at Ocean View and (Ellis believed) 45th. Sandoval said that he was instructed to leave the keys in the ashtray, leave the vehicle, and proceed to a distance approximately two or three blocks away, from which point he could observe the vehicle. Sandoval had been instructed to wait, that someone would pick up the vehicle and return it about an hour later, and that it would be left in order that he could return in the vehicle to Mexico

[M. S. 21-23].

Customs Agent Paul Samaduroff subsequently observed the Ford parked on Ocean View by 45th Street. This was on the same date [M. S. 5-7]. Samaduroff had been informed by Ellis that he had good information (or words to that effect) that there were narcotics in the Ford, and he had been told about the Buick following some distance behind the Ford. He was informed by radio that the same Buick was in the area of 45th and Ocean View. Samaduroff observed a male walking from the Buick toward Ocean View. Samaduroff parked elsewhere and was informed that the man walking from the Buick had entered the Ford and had proceeded up Ocean View [M. S. 6-9, 13].

Samaduroff followed the Ford, which parked in front of a grocery store at Logan and 45th. Ellis, who saw the Buick leave the area, instructed Samaduroff "to pick up the '55 Ford with occupant". Ellis was in charge of the case [M. S. 9, 13, 27-28].

Ellis then arrested appellant Lewis, who was alone in the Ford and was seated in the driver's seat. The original driver of the Ford had previously left [M. S. 11, 15-17]. Ellis stopped the Buick on another street. Appellant Lee was the occupant of the Buick. No contraband was found in the search of that vehicle [M. S. 28, 30].

The arrest of Lewis occurred approximately 30 minutes after Ellis saw Sandoval [M. S. 27]. The Ford was moved to the Customs office immediately after the arrest. Then it was moved to a service station, there being no facilities at the Customs office

for thorough search of the vehicle. Such facilities also were lacking at the scene of the arrest. The officers did not know the exact location of the narcotics in the vehicle. A hoist was needed in order to left the vehicle [R. T. 117-18; M. S. 12].

It took fifteen minutes to move the Ford from the scene of the arrest to the Customs office. It remained there for five minutes, and it took a couple of minutes to move it to the service station. The search consumed the remainder of the approximately two hours that elapsed between the time of arrest and the time of the discovery of the evidence in question [R. T. 118].

The officers found seven contraceptives, containing what appeared to be narcotics, under the window moulding on the right-hand door and the left-hand door. There was no search warrant [M. S. 12-15; R. T. 48].

The trial Court held that there was probable cause to arrest appellants; that the informant was a reliable informant; that it was reasonable and proper to move the Ford to the Customs office and also reasonable to move it to a service station before the search occurred; that the search was conducted as promptly as it could be conducted; and that the search occurred within a reasonable time after the arrest [R. T. 119; M. S. 39-40]. The trial Court also held that it was impractical to secure a search warrant before Lewis was arrested; that Samaduroff was acting under the directions of Ellis; and that Lee had no standing to object to the search [R. T. 120-21; M. S. 39-40].

B. The Trial

On October 8, 1965, Leobardo Sandoval told Customs Agent Thaine Ellis that a narcotics dealer named Tino in Tijuana, Mexico, had offered to pay him $50 for driving an automobile into the United States. Sandoval had provided reliable information in narcotics cases in the past. In each case the information had proved to be true [R. T. 77, 93-95].

The usual smuggling procedure in cases of this nature involved an advance payment for the narcotics in Mexico by the American buyer, with another person being hired to drive the vehicle across the border and leave it on the American side. The purchaser would pick up the vehicle and the narcotics. In other cases, the Mexican narcotics peddler would conceal the narcotics in an inexpensive vehicle and hire someone, usually a Mexican citizen, to drive the vehicle across the border, leave it for an hour, and then return it to Mexico [R. T. 103].

A 1955 Ford station wagon arrived from Tijuana, Mexico, at San Ysidro, California, at approximately 11:45 a. m. on October 9, 1965 [R. T. 22-23, 25]. The Mexican who was driving the vehicle declared no merchandise [R. T. 23, 26]. Agent Ellis directed that the vehicle be sent through without a thorough inspection [R. T. 96]. When searched later in the day, the Ford station wagon contained approximately six ounces of cocaine and three-fourths of an ounce of heroin [R. T. 18-21, 61, 65-66].

Customs Port Investigator George Gore followed the Ford

in an unmarked vehicle as the Ford left the port of entry. The vehicles proceeded from Highway 101 to U. S. Highway 101 Alternate and on the latter road to an intersection in Otay. At that point Gore reached the conclusion that a third vehicle was following the Ford and his own vehicle. He advised Agent Ellis of this conclusion by radio. The third vehicle, a black Buick with Nevada license plates, contained one male and one female. Gore subsequently noted the license number and gave it to Ellis [R. T. 26-30].

The Ford and Buick both turned left on Main Street and proceeded to the west. Both vehicles turned right from Main Street and proceeded on Broadway. The Ford turned right on Moss Street in Chula Vista. The Buick continued for one block, made a left turn and a U-turn, and ended up on Moss Street. The distance from the port of entry to Moss Street was about 6-1/2 miles. The Buick had first been observed behind the Ford and Gore's vehicle at a point about one or one and one-half miles from the port of entry [R. T. 28-30, 36, 50].

Agent Ellis had observed the Ford near Moss and Broadway, had recognized the driver, Sandoval, and had waved to him to turn on Moss. Ellis talked to Sandoval and told him to turn off Moss and remain out of sight for a few minutes. Ellis subsequently observed a black Buick turn onto Moss Street from Broadway [R. T. 78-79].

After various driving maneuvers Ellis met Sandoval again, the Ford driven by Sandoval was parked in a garage in Chula Vista, and various agents and Sandoval had a meeting at that point at

approximately 12:30. Sandoval told Ellis that he had been propositioned to take the Ford to 45th and Ocean View Avenue in the Logan Heights area of San Diego. Ellis told him to drive the Ford to that location [R. T. 50, 78, 81]. Sandoval drove to 45th and Ocean View, parked the vehicle at that location, and left the vehicle [R. T. 61, 81-83]. In order to reach 45th and Ocean View, Sandoval had driven to Broadway, turned right, went to "H" Street in Chula Vista, turned left, took the 101 Freeway to Wabash, went from Wabash to Ocean View, and turned right on Ocean View [R. T. 61, 62]. The distance was about eight miles from Moss Street [R. T. 36].

Shortly afterwards, appellant Lewis was observed as he operated the Ford station wagon on Ocean View [R. T. 53, 62-63]. He had just previously been seen in a black Buick which was driven away from the scene by appellant Lee [R. T. 45-47]. This was the same Buick that had been observed behind the Ford and Officer Gore's vehicle during the trip through Otay [R. T. 29, 62-63]. Its presence was reported to all units by radio [R. T. 62-63].

Lewis parked the Ford station wagon in front of a store or market and was arrested at that location [R. T. 64-65, 75]. Appellant Lee was stopped as she left the scene in the Buick. When the officers left their vehicle (which was not distinctively marked as a police vehicle), Lee drove away again: "She went around the corner real fast to the right and we spun our wheels to get around her, honked our horn and flashed the red light, and had to come up alongside and pull her over to the curb and make her stop." [R. T. 51, 148].

Agent Ellis, who participated in the arrest of Lee, questioned her regarding the whereabouts of the man who had been with her in the vehicle. She did not answer. Ellis told her that the man had been arrested, and she said, "I want to be with him" [R. T. 84-85]. Customs Investigator Prentice White asked Lee where she had gone or what she had done on that date. She said that they had come to San Diego. After White mentioned Tijuana she said that she had gone to Tijuana that morning [R. T. 142-43] and refused to make other statements [R. T. 142-43].

Since narcotics are frequently concealed in the undercarriage of a vehicle, and since a lift was needed in order to raise the Ford and examine the undercarriage, the Ford was moved to a service station about three blocks from the Customs office. The officers did not know the exact location of the contraband in the vehicle [R. T. 74, 151, 152].

The search of the Ford at the service station lasted from 1-1/2 to 2 hours before seven packets were found inside the moulding of the two front doors [R. T. 48, 65-66, 152]. Six of the packets contained cocaine and the seventh contained heroin. There were approximately six ounces of cocaine and at least three-fourths of an ounce of heroin [R. T. 18-21]. Various witnesses testified (either directly or by stipulation) concerning the "chain of possession" of the narcotics [R. T. 48-49, 66, 85-86, 110-113].

The cocaine had a sales value of about $500 per ounce in Mexico ($3,000). The six ounces had a potential wholesale value of $30,000. The heroin had a potential wholesale value of about

$3,000 per ounce [R. T. 99-101].

Appellant Lee testified that she and Lewis left Nevada at about midnight on Friday, October 8; that they "were just lovers taking a trip"; that they stopped in Los Angeles; that they went to Mexico at about 8:30 or 9:00 in the morning; that she and Lewis were together all of the time that they were in Tijuana; that she did not observe Lewis making any telephone calls or having a conversation with anyone else; and that Lewis later got out of the Buick in San Diego [R. T. 124-26, 130].

She continued as follows:

> "Q. And where did he say he was going?
>
> "A. He told me he was going to take a walk because he was mad and he told me to make two or three blocks and pick him up in about six minutes.
>
> "Q. Where did he tell you to pick him up in about six minutes?
>
> "A. Same place.
>
> "Q. Same spot?
>
> "A. Same area." [R. T. 130-31].

Lee denied under oath the assertion that she started to drive away after the officers stopped her and emerged from their vehicle [R. T. 141].

After questioning Lee, the officers listed her address as 2717 Royal Court, North Las Vegas, Nevada. She testified that her address at that time actually was 421 Elizabeth, North Las

Vegas, Nevada [R. T. 123, 145]. Lewis also lived at 421 Elizabeth in North Las Vegas. However, Lee testified that she did not live with Lewis [R. T. 129, 145]. The Buick involved in this case was registered to a "Katherine Joseph" at 421 Elizabeth Street, Las Vegas, Nevada [R. T. 146].

While questioning Lee, White was informed that she previously lived on Normandy Street in Los Angeles. Lee testified at the trial that she did not previously live on Normandy Street in Los Angeles and that she did not tell the officers that she had lived there [R. T. 129, 145-46].

Lee told White that she was employed as a dancer in an officers' club. She testified at the trial that she was a file clerk at the time of the arrest [R. T. 139, 143]. Lee told While that she was 20 years of age. She testified at the trial that she was 18, was born in March,1947, and graduated from high school in 1963 [R. T. 128, 130, 135, 143].

Lee testified that Lewis had never told her anything about the case [R. T. 136]. She testified upon direct examination that she stopped in Los Angeles on the way to San Diego and did not know the time that she left Los Angeles [R. T. 124-25]. This testimony occurred after evidence had been introduced to the effect that Lewis had stated that he stopped in Los Angeles on the way [R. T. 89]. However, under cross-examination, Lee testified that they came straight from Las Vegas to Tijuana [R. T. 135]. Lee also testified that she was not advised of her right to an attorney by Agent Ellis. Ellis testified that he did advise her of her right to

an attorney [R. T. 90, 132].

Appellant Lewis did not testify [R. T. p. i].

It was necessary for the officers to employ a cross-cut Phillips screwdriver in order to remove the panels which concealed the narcotics [R. T. 48-49, 67]. Lewis had a Phillips screwdriver in his pocket on the date in question [R. T. 91].

October 9, 1965 was a Saturday [R. R. 124].

In the case of Lewis, the jury was instructed in regard to the statutory presumption under Title 21, United States Code, Section 174. This instruction was limited to Lewis and did not apply to appellant Lee [R. T. 204].

V

ARGUMENT

A. APPELLANT LEE HAD NO STANDING TO OBJECT TO THE ADMISSIBILITY OF THE CONTRABAND.

Appellant Lee contends that the trial Court committed prejudicial error in the denial of Lee's Motion to Suppress Evidence where the denial was based in part upon the ruling that Lee had no standing to object to the search. The search in question was the search of a Ford station wagon. Lee was not in the Ford when it was searched, was not in it when it was stopped, and did not at any time claim any interest in the Ford or in the contraband that was seized. Consequently, she had no standing to object to the

stopping of the Ford, the search of the Ford, and the admissibility of the narcotics in evidence. The jury was not instructed under he statutory presumption of Title 21, United States Code, Section .74 in Lee's case. This instruction was limited to appellant Lewis's case [R. T. 204].

Diaz-Rosendo v. United States, 357 F. 2d 124
(9th Cir. 1966).

Appellant Lee contends that the case of Jones v. United States, 362 U. S. 257 (1960), is controlling. In Diaz-Rosendo, upra, in an en banc hearing, this Court reached the unanimous onclusion that the Jones rule did not apply under circumstances imilar to those of the instant appeal. [4/] Here, as in Diaz-Rosendo at p. 132), appellant Lee was not on the premises "where the earch occurred" and her conviction "did not flow from the possesion" by herself at the time of the search.

B. THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION OF APPELLANT LEE.

Appellant Lee argues that the evidence against her was

[4/] It should be noted that where a trial involves two defendants, the admissibility of evidence against one defendant will not e affected by the claim that the evidence was illegally seized from he co-defendant.

Mosco v. United States, 301 F. 2d 180, 188
(9th Cir. 1962), cert. den. 371 U. S. 842
(1962);
Daddio v. United States, 125 F. 2d 924
(2nd Cir. 1942.

insufficient to justify a verdict of guilty.

It is respectfully submitted that the circumstantial evidence was sufficient to sustain Lee's conviction. Aiding and abetting is frequently proved by circumstantial evidence.

Diaz-Rosendo, supra, at p. 129.

Appellants do not question the sufficiency of the evidence against Lewis, who picked up the vehicle with the narcotics and had the Phillips screwdriver in his pocket [R. T. 53, 62-63, 91]. Lee's participation in the crime was clearly shown by her assistance in driving the Buick away from the critical area of the criminal venture; her escape attempt; her seemingly inexhaustible capacity for falsehood when questioned concerning the matter; and the basic absurdities in her version of the events of the date in question.

It is evident that Lee's role in the crime was to operate the Buick. Lewis could not remove both vehicles from the vicinity of 45th and Ocean View, and he certainly would not want to carry out the difficult process of removing the narcotics from the Ford in a populated area. A driver was necessary, and Lee fulfilled that role. The question is whether she had knowledge of the crime. The evidence is circumstantial.

It is evident that Lee was with Lewis when the Ford was being followed by the same Buick in which Lee was later apprehended [R. T. 26-30, 51, 62-63]. The Ford, which upon later search was found to have the narcotics, entered the United States from Mexico at the port of entry at San Ysidro [R. T. 18-20, 22-23, 25, 65-66].

About one or one and a half miles from the part of entry, the Buick was observed behind the Ford. It continued to follow the Ford upon a winding route for a distance of from 5 to 5-1/2 miles, through Otay to a point in Chula Vista [R. T. 28-30, 36, 50]. The Ford was subsequently moved to a point about eight miles away from Chula Vista, in another city, San Diego. Appellants and the same Buick arrived at the scene, Lewis entered the Ford and the Ford and Buick left the scene [R. T. 36, 45-47, 53, 62-63].

Lee was stopped by the officers. After they left their vehicle, she attempted to escape in the Buick at high speed but was forced to a stop. She does not claim that she did not know that they were officers. On the contrary, she testified that she made no attempt to drive away after the officers first halted her forward progress [R. T. 141, 148].

When Lee was told that her male companion had been arrested, instead of indicating surprise or innocense, she merely stated, "I want to be with him" [R. T. 84-85]. When asked where she had gone or what she had done on that date, Lee said they had come to San Diego. She said nothing about Tijuana until it was evident that the officers were aware of the trip in that direction [R. T. 142-43].

The evidence is viewed in the light most favorable to the prevailing party in the trial Court.

Diaz-Rosendo, supra, at p. 129. Consequently, it is evident that Lee provided a false address, a false age, and a false occupation, either at the time of arrest or at the time of trial

[R. T. 123, 128, 130, 139, 143, 145]. At the time of arrest, Lee concealed the fact that she was living at the same address provided by the co-defendant, Lewis. At the trial, she admitted that she had lived at that address (421 Elizabeth Street, North Las Vegas, Nevada), but denied that she lived with Lewis [R. T. 123, 129, 145]. There was no attempt to explain the fact that the Buick was registered to a "Katherine Joseph" at the same address [R. T. 146].

Lee's explanation for the events in question was completely incredible. She testified that she and Lewis were together at all times in Tijuana and that she did not observe Lewis making any telephone calls or having a conversation with anyone else [R. T. 126]. She testified they separated in San Diego because Lewis "told me he was going to take a walk because he was mad and he told me to make two or three blocks and pick him up in about six minutes". She testified that he said he was to be picked up in the same "area" [R. T. 130-131].

Another remarkable feature in Lee's version of the events is her statement under oath, at the time of trial, to the effect that Lewis had never told her anything about the incidents in question [R. T. 136]. They had the same attorney.

In addition to the falsehoods already mentioned, Lee testified falsely that she did not tell the officers that she had previously lived on Normandy Street in Los Angeles [R. T. 129, 145-46]; testified falsely that she was not advised of her right to an attorney [R. T. 90, 132]; and testified on direct examination that she stopped in Los Angeles on the trip and contradicted this under cross-

examination [R. T. 124-25, 135]. It is doubtful that her numerous falsehoods can be attributed to lack of intelligence, for she testified under oath that she graduated from high school in 1963, which would have occurred at the early age of 16, since she testified that she was born in March 1947 [R. T. 130, 135].

False statements constitute evidence tending to show guilt.

Wilson v. United States, 162 U.S. 613, 621 (1896).

In the instant case, as in Eason v. United States, 281 F.2d 818, 821 (9th Cir. 1960), it is respectfully submitted that "the evidence of close friendship, joint venture and general conduct were sufficient to warrant a reasonable jury finding beyond reasonable doubt" that both appellants were guilty.

Appellant Lee cites Arellanes v. United States, 302 F.2d 603 (9th Cir. 1962), cert. den. 371 U.S. 930 (1962). However, in Arellanes there was no evidence that the successful appellant, Mrs. Arellanes, did anything other than keep company with her husband and making one idle remark. This Court stated in the opinion:

> "There was, we point out, no showing here of the elements of joint venture, as in Eason v. United States, 281 F.2d 818, 821 (9th Cir. 1960)."
>
> (at p. 607).

The instant case has every indication of a joint venture, even to the extent that there was no separation in Tijuana, as there was in Eason, supra, where the defendants were together "most of the time" (at p. 820).

Appellant Lee emphasizes the requirement of proof of her knowledge of illegal importation, citing a number of cases involving the statutory presumptions under Title 21, of the United States Code. However, the possession presumption of Title 21, United States Code, Section 174, was not applied in Lee's case [R. T. 204] and is not relevant here. Possession is not an essential element of crimes arising under Title 21, United States Code, Section 174.

> *Rodella* v. *United States*, 286 F. 2d 306, 311 (9th Cir. 1960), *cert. den.* 365 U. S. 306 (1961);
>
> *Pon Wing Quong* v. *United States*, 111 F. 2d 751, 758 (9th Cir. 1940)

Consequently, the prosecution need not rely upon the statutory presumption arising from proof of possession.

> *Rodella*, *supra*, at p. 311.

Proof of unlawful importation arises from the evidence of the entry by the Ford, the statement by a reliable informant to the effect that a narcotics dealer in Tijuana had offered to pay him $50 for driving an automobile into the United States [R. T. 77, 93], the Lee-Lewis trip to Tijuana and their subsequent driving maneuvers in connection with the Ford, and other evidence in the case. While it is theoretically possible that the narcotics could have been secreted by Sandoval after he left the garage in Chula Vista, the issue is not resolved by speculation about remote possibilities. In *Stoppelli* v. *United States*, 183 F. 2d 391, 393-94 (9th Cir. 1950), *cert. den.* 340 U. S. 864 (1950), this Court stated:

> "No doubt, flights of fancy, to infer innocent possession, could be indulged in. Stoppelli might have had powdered sugar in the envelope to feed his pet canary. But in that event, how did it get into the package of heroin? A reasonable mind would have to discard its common sense to indulge in such capricious vagaries. It is such speculation and caprice that juries are instructed to avoid in resolving the question of reasonable doubt."

This statement of the law would apply not only to speculation that the narcotics might not have crossed the border in the Ford, but also to "flights of fancy" involving speculation that Lee was not aware of Lewis' criminal design, under the evidence that was heard by the triers of fact.

C. APPELLANT LEWIS'S MOTION TO SUPPRESS EVIDENCE WAS PROPERLY DENIED.

Appellant Lewis contends that the search of the Ford was not reasonable, because Agent Samaduroff "acted on the word of Agent Ellis" (Appellants' Opening Brief, p. 9). He does not contend that the search was unreasonable because it did not occur at the exact place and time of the arrest. [5/] It was entirely proper for

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[5/] Such a claim would not find support in the legal authorities. Not every search of a vehicle incident to arrest must take (continued)

Agent Samaduroff to rely upon the instructions of Agent Ellis in making the arrest. In Cervantes v. United States, 263 F. 2d 800, 804 (9th Cir. 1959), in which Officer Davis stopped the suspect's vehicle because he had received an "alert" and "not because of any personal knowledge of wrongdoing", this Court stated:

> "Davis was unquestionably warranted in acting on the basis of the 'alert', since he was then entitled to assume that such alert was issued for probable cause."
> (Footnote 6, p. 804).

Samaduroff similarly could assume that Agent Ellis had probable cause.

In Williams v. United States, 308 F. 2d 326 (C. A. D. C. 1962), the Court of Appeals rejected an argument practically identical to that set forth by appellant Lewis:

> "We have set forth appellant's contentions in some detail because they are relatively novel claims. We

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5/ (continued) place at the scene of arrest.

United States v. Wallack, 255 F. Supp. 566, 568-69 (S. D. N. Y. 1966).

Furthermore, where there is a right to impound a vehicle, it is in the lawful custody of the United States and may be searched away from the scene of an arrest.

Drummond v. United States, 350 F. 2d 983, 988 (8th Cir. 1965).

In addition, the relation of the search to the scene of arrest would be immaterial if this was a border search or if there was reasonable cause to believe that the vehicle contained contraband.

> avail ourselves of the occasion to make it clear that in a large metropolitan police establishment the collective knowledge of the organization as a whole can be imputed to an individual officer when he is requested or authorized by superiors or associates to make an arrest. The whole complex of swift modern communication in a large police department would be a futility if the authority of an individual officer was to be circumscribed by the scope of his first hand knowledge of facts concerning a crime or alleged crime."

Williams, supra, at p. 327.

Appellant Lewis states that Agent Ellis was not a reliable arty. However, it has been held that an officer is a reliable nformant.

People v. Lopez, 196 Cal. App. 2d 651, 654 (1961).

In Cervantes, supra, the search was unreasonable because he officer who was responsible for the "alert" did not have probable ause. In the instant case, however, Agent Ellis, who ordered gent Samaduroff to "pick up" the Ford and occupant [M. S. 27-28], ad probable cause to arrest. Agent Ellis had been informed by a reviously-reliable (three times) informant that a Ford with a ertain license number would be used to transport a quantity of arcotics into the United States. The Ford entered the United tates on the predicted morning [M. S. 18-19, 31]. Ellis needed

nothing more, since an arrest may be based solely upon information provided by a single reliable informant.

Costello v. United States, 324 F. 2d 260, 262 (9th Cir. 1963), cert. den. 376 U. S. 930 (1964);

Jones v. United States, 326 F. 2d 124, 128-129 (9th Cir. 1963), cert. den. 377 U. S. 956 (1964);

United States v. Salgado, 347 F. 2d 216, 217 (2nd Cir. 1965), cert. den. 382 U. S. 870 (1965);

United States v. Campos, 255 F. Supp. 853, 857 (S. D. N. Y. 1966);

People v. Guerrera, 149 Cal. App. 2d 133, 136 (1957);

People v. Garnett, 148 Cal. App. 2d 280, 284 (1957).

Although corroboration of this previously-reliable informant's information was not required, corroboration was provided by the fact that the Buick followed the Ford for a distance of from 5 to 5-1/2 miles on a winding route through Otay to Chula Vista [R. T. 28-30, 36, 50], and the additional fact that a man from the same Buick entered the Ford an additional eight miles away, in another city, and started to drive away [R. T. 36, 45-47, 53, 62-63]. [6/]

[6/] Some of these facts appear only in the transcript of evidence at trial, as distinguished from the transcript of testimony at the hearing of the Motion to Suppress Evidence. However, the evidence may be considered upon appeal. (continued)

Agent Ellis presumably was aware of the fact that a man from the Buick had entered the Ford and was driving away, as Samaduroff had just reported his observation of the Buick to all units by radio, he had another radio conversation with Ellis when he saw the Buick in a parked position, he had an additional radio conversation with Ellis, and he was acting under the directions of Ellis when he arrested the driver of the Ford [R. T. 62-65]. Samaduroff had previously been informed (1) that Ellis had good information (or words to that effect) that there were narcotics in the Ford, (2) that the Buick had been following some distance behind the Ford, and (3) that a man from the same Buick had entered the Ford and was driving that vehicle [M. S. 6-9, 13]. Consequently, Samaduroff had all of the essential particulars known to the officer (Ellis) who ordered the arrest, which is a factor emphasized by the Court in Ng Pui Yu v. United States, 352 F. 2d 626, 629 (9th Cir. 1965).

It should be mentioned that the officers did not need probable cause to arrest Lewis, so long as they had probable cause to believe that the vehicle contained smuggled merchandise.

> Browning v. United States, 366 F. 2d 420, 422 (9th Cir. 1966);
>
> Thomas v. United States, 363 F. 2d 159, 160 (9th Cir. 1966).

Validity of an arrest is immaterial where the search is based upon reasonable grounds to believe that contraband is present.

6/ (Continued)
Carroll v. United States, 267 U. S. 132, 162 (1925).

Hernandez v. *United States*, 353 F. 2d 624, 627 (9th Cir. 1965).

Furthermore, there is good authority for the conclusion hat the search was valid as a border search, requiring neither an rrest nor probable cause.

King v. *United States*, 348 F. 2d 814, 817 (9th Cir. 1965), *cert. den.* 382 U. S. 926 (1965);

Alexander v. *United States*, 362 F. 2d 379, 381-82 (9th Cir. 1966).

In *Alexander*, this Court held (at p. 382) that the legality of border search that is not made in the immediate vicinity of the order "must be tested by a determination whether the totality of he surrounding circumstances, including the time and distance lapsed as well as the manner and extent of surveillance, are such s to convince the fact finder with reasonable certainty that any ontraband which might be found in or on the vehicle at the time of earch was aboard the vehicle at the time of entry into the jurisdic-ion of the United States. Any search by Customs officials which eets this test is properly called a 'border search'." 7/ It is espectfully submitted that the *Alexander* test was met in the instant ase.

/ In his thorough discussion of the subject of border searches in the dissenting opinion in *Corngold* v. *United States*, 367 . 2d 1 (9th Cir. 1966), Judge Barnes states (footnote at p. 16) that he rule is more liberal than *Alexander* suggests.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted hat the judgments of the District Court should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this rief, I have examined Rules 18 and 19 of the United States Court f Appeals for the Ninth Circuit, and that, in my opinion, the oregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson
PHILLIP W. JOHNSON

NO. 21,049

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ISAO YAMADA, MITSU YAMADA,
KATSUMI YAMADA and THREE STAR
PRODUCTS, LTD.,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

RESPONDENT'S BRIEF

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FILED

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WM. B. LUCK, CLERK

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CASES

NO. 21,049

IN THE UNITED STATES COURT OF APPEALS

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ISAO YAMADA, MITSU YAMADA,
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IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

RESPONDENT'S BRIEF

JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to 8 USC 1105(a).

The Order to Show Cause issued on June 11, 1963, and charged deportability under Section 241 (a)(2) of the Act (8 USC 1251(a)(2)), remained longer than permitted after nonimmigrant admission

under Section 241(a)(15) (8 USC 1101(a)(15)), (R., Exhibit No. 1, p. 137). After the hearing on July 29, 1963, the Special Inquiry Officer made his decision on September 3, 1964 (R., p.25) and found that "the deportation charge against each of the respondents has been sustained." He then accorded them the privilege of voluntary departure in lieu of an order of deportation.

Petitioners appealed to the Board of Immigration Appeals on September 21, 1964. The Board of Immigration Appeals dismissed the appeal on January 15, 1965. (R., p. 1.)

On March 26, 1965, Three Star Products, Ltd., filed Form I-140, petition (Section 203(a)(1)(A)) to classify status of alien as first preference quota immigrant (R., pp 265-270). [1]

On June 25, 1965, the petition of Three Star Products was denied by the District Director. (R., p. 257.)

---

[1] The Certified Record is divided into two parts. The Record pertaining to the Three Star Products, Ltd., application begins at page 226.

On July 1, 1965 a motion was made for reconsideration (R., p. 256.) This motion was granted on July 12, 1965, and Three Star was accorded to August 9, 1965, to submit any additional evidence or arguments. The time was extended from August 27, 1965 (R., p. 253), to October 15, 1965 (R., p. 250), and on November 15, 1965, respondent was notified by the Department of Labor, State of Hawaii, that "we have declined to initiate a clearance order in this case" (R., p. 247.) On November 30, 1965, a notice of denial was sent to Three Star Products Ltd. (R., p. 245) by the respondent. On December 13, 1965, Three Star Products Ltd. appealed to the Regional Commissioner (R., p. 234). The appeal was dismissed by order of the Regional Commissioner on March 21, 1966 (R., p. 228).

The petition to review the final order of deportation was filed by petitioners on June 3, 1966, a few days short of a year and six months from the date of the dismissal of the appeal by

the Board of Immigration Appeals (January 15, 1965), but three months and a day following the dismissal of the appeal of Three Star Products, Ltd., from the denial of their petition.

The petition herein is filed in the names of the three subject aliens and the Three Star Products, Ltd. By joining Three Star Products, Ltd., review of the petition for first preference visa is sought.

Petitioners in their jurisdictional statement have cited 8 USC 1105(a) without further amplification, other than to say that there is no final order of deportation more than six months prior to the filing of this petition. Clearly the final order was a year and a half prior to the filing of the petition. The application of Three Star Products to classify the beneficiary as a first preference alien under Section 203(a)(1)(A) of the Act did not affect the validity of the deportation order. Three Star could not on its own petition this Court to review the denial

of the application. The situation is thus one wherein the subject aliens failed to petition for review within the six months following the dismissal of their appeal, but rely upon a petition filed by Three Star Products as having extended the time to appeal to six months subsequent to denial of the petition.

Does this Court have jurisdiction?

Reference is first made to Foti v. Immigration & Naturalization Service, 375 US 217, and to Giova v. Rosenberg, 379 US 18, which, we believe, favor a broad interpretation of Section 106(a) to include such matters as applications for discretionary relief.[2/] This broad interpretation encompasses other determinations made during and incident to the administrative proceedings conducted by the Special Inquiry Officer which results in the final order of deportation.

[2/] Samala v. INS, 336 F.2d 7 (5th Cir.); Talavera v. Pederson, 334 F.2d 52 (6th Cir.); Skiftos v. INS, 332 F.2d 203 (7th Cir.); Scalzo v. Hurney, 338 F.2d 339 (3d Cir.); Mendez v. Major, 340 F.2d 128 (8th Cir.); Roumeliotis v. INS, 304 F.2d 453 (cert. den. 371 US 921).

In the Yamada case, the petition for first preference visa was directed to the District Director by the Three Star Products, Ltd. Upon the denial, the appeal was to the Regional Commissioner. If the only question presented for decision involves the scope of judicial review by the Courts of Appeal of administrative determination made during the course of deportation proceedings (Foti v. INS, supra, p. 221), then it would appear that this Court does not have jurisdiction unless some other criterion is found. The Supreme Court in Foti v. INS, supra,p. 225, quoted from the Committee Report on §106(a) concerning the Congressional purpose "to create a single separate statutory form of judicial review of administrative orders for the deportation * * * of aliens * * * ".

This Court, in Bregman v. INS, 351 F.2d 401, considered the effect of the denial of a motion to reopen, made within six months of the final order,

and the petition to the court within six months of the denial of the motion.

This Court held "It follows from Giova that if the motion to reopen before the Board is within six months of the final order of deportation and the petition to this Court is within six months of the denial of the motion * * *, this Court has jurisdiction to review both the final order of deportation and the denial of the motion to reopen." The motion to reopen clearly required a "determination to be made during and incident to the administrative proceedings conducted by the Special Inquiry Officer."

Not so Yamada.

STATEMENT OF FACTS

Assuming this Court has jurisdiction, there are two separate proceedings to be considered.

First: The determination of deportability on the charge in the order to show cause and Section 241(a)(2) of the Act (8 USC 1251(a)(2)). Included is the denial of the application for extension of

stay and denial of the motion for reconsideration, said denials having been based upon the District Director's finding that Isao Yamada was never entitled to the status of an employee of a treaty investor granted him on December 8, 1958.

Second: The denial of the application of Three Star Products for a first preference visa, of which Isao Yamada was the beneficiary.

First, on the order of deportation, Isao Yamada was admitted to the United States at Honolulu, Hawaii, on June 8, 1957, as an industrial trainee under Section 101(a)(15)(H)(iii) of the Act. On December 8, 1958, he filed an application for change of nonimmigrant status to that of a nonimmigrant employee of a treaty investor under Section 101(a)(15)(E)(ii) of the Act. This application, approved by the District Director on December 8, 1958, authorized stay in that status to December 8, 1959, conditioned upon maintenance of status. The other two

petitioners were admitted to the United States on June 25, 1960, as the family of a treaty investor employee. All petitioners were given extension of temporary stay to December 19, 1962. On January 16, 1963 the District Director denied their application for further extension (R., pp. 159-162) on the ground that Isao Yamada was never entitled to the status of an employee of a treaty investor. On May 2, 1963 their motion for reconsideration was denied for the same reason (R., p. 171). The order to show cause issued on July 29, 1963, charging all three petitioners to be deportable under Section 241 (a)(2) of the Act. A hearing was conducted by a Special Inquiry Officer on February 17, 1964, and in a decision dated September 31, 1964, the Special Inquiry Officer found the charge sustained, and granted petitioners the privilege of voluntary departure in lieu of deportation. This decision was appealed to the Board of Immigration Appeals. By decision dated January 15, 1965, the Board of Immigration Appeals dismissed the appeal.

<u>Second, on the application for first preference visa</u>, on March 26, 1965, Three Star Products filed a petition to classify the beneficiary Isao Yamada as a first preference alien under Section 203(a)(1)(A) of the Act (8 USC §1153(a)(1)(A)). On April 16, 1965, the petition was returned to the petitioner for compliance with the following: (1) submit a United States Employment Service clearance order (R., p. 229). On May 27, 1965, application was made to the Employment Service Division, Department of Labor and Industrial Relations, State of Hawaii (R., p. 261). By letter dated June 1, 1965, the Department of Labor informed the applicant that because of certain specifications the matter was considered as not warranting a certified clearance order. (R, p. 260).

On June 6, 1965, a waiver of clearance order was sought (R., p. 259). On June 28, 1965 the District Director denied the application for waiver of the clearance order and the petition to classify Isao Yamada as first preference quota

immigrant (R., pp 257-258). On July 1, 1965, a motion was made for reconsideration (R., p. 256). Time was allowed to present additional evidence (R., p. 253). On October 22, 1965, the warrants of deportation were cancelled pending final adjudication on the visa petition (R., p. 249). By letter dated November 15, 1965, the Department of Labor notified the District Director that it was their opinion that "the position can be filled by local manpower within a relatively short training period. For this reason, we have declined to initiate a clearance order in this case." (R., p. 247). On November 30, 1965 the District Director notified applicant Three Star Products that upon reconsideration, the petition was denied (R., p. 245). The Order of the District Director denying the petition was appealed to the Regional Commissioner.

This appeal was dismissed by order of the Commissioner on March 21, 1966 (R., pp 228-233) on the ground that, absent the clearance order, the petition was not approvable under the statute or

regulations in existence prior to December 1, 1965, nor under Public Law 89-236, October 3, 1965, and the regulations promulgated thereunder without a "'certification' from the United States Employment Service" (R., p. 233).

The petition to review was filed in this Court on June 3, 1966.

SPECIFICATION OF ERRORS

1. Respondent erred in holding that a non-immigrant employee of a treaty investor under the Treaty of Friendship, Commerce and Navigation between the United States and Japan must continue to secure extension of stay in the United States;

2. Respondent erred in holding that permanent resident aliens do not come within the meaning of "nationals" holding 51% interest to qualify petitioner as a treaty investor;

3. Respondent erred in holding that Three Star Products, Ltd., cannot occupy status of a treaty investor;

4. Respondent erred in refusing to accord Isao Yamada status of an employee of a treaty investor;

5. Respondent erred in requiring clearance order for consideration of petition for classification as first preference quota immigrant.

QUESTIONS PRESENTED

1. Does Isao Yamada have any status under the Treaty which permits him to remain in the United States?

2. Is the submission of a labor clearance order required for consideration of the petition to classify as first preference quota immigrant?

The Board of Immigration Appeals considered the appeal before it as presenting four questions:

1. Jurisdiction of the Special Inquiry Officer and the Board to review the action of the District Director.

This point was briefed at length by the acting trial attorney (R., pp 42-48). He urged the position that where an application for an extension of stay is denied "as a matter of law" by a District Director, as distinguished from a matter of discretion,

the validity of the legal determination of the District Director may be reviewed in deportation proceedings by the Special Inquiry Officer, and thereafter by the Board of Immigration Appeals. The Service's representative before the Board of Immigration Appeals stated to the Board that the trial attorney erred in urging his position, and that the Special Inquiry Officer erred in so holding.

The Board of Immigration Appeals held as follows (R., P. 3):

> "We have carefully considered the issue of jurisdiction engendered by this case. The determination of the respondents' deportation as having remained longer originated with the action of the District Director. His denials were based on a legal determination arising from his construction of the meaning of treaty investor employee (as defined in the Immigration and Nationality Act). A consideration of the respondents' deportability is inescapably merged with the District Director's finding as to the respondents' employee. The intent of 8 CFR 3.1(d) necessitates our assuming jurisdiction in order to determine deportability of the respondents. We so hold."

2. Does the treaty between the United States and Japan supersede the provision of the Immigration and Nationality Act of 1952 and the regulation promulgated thereunder?

3. Are respondents properly entitled to status (in the case of the adult male as a treaty investor employee?)

4. Is the charge in the order properly sustainable as to the female and minor respondents?

Petitioners raise no issue on this question before this Court, neither do respondents.

Respondents submit there are but two questions:

1. The status of Isao Yamada;
2. The requirement of the clearance order on the First Preference Application.

The first question goes to the final findings of the Special Inquiry Officer and the Board of Immigration Appeals.

The second question goes to the final rulings of the District Director and the Regional Commissioner.

ARGUMENT

I

THE PETITIONER ISAO YAMADA IS NOT ENTITLED TO STATUS AS A TREATY INVESTOR EMPLOYEE

Isao Yamada was admitted to the United States as a nonimmigrant industrial trainee. (Section 101(a)(15)(H)(iii). He later applied for change of nonimmigrant status to that of a nonimmigrant employee of a treaty investor under Section 101(a)(15)(E)(ii). This application was at first approved, authorizing a stay in that status to December 8, 1959. The application for extension was denied on the ground that his employer, Three Star Products, Ltd., did not qualify as a treaty investor.

The Board of Immigration Appeals (R., p. 5) said:

> "We do not think it necessary to delve further into the operation and history of the respondent's employee. We consider academic the tenor and intent of the treaty under which respondent seeks to justify his claim. There is nothing unusual in the language of the document. Mutuality is stressed but the treaty does not in any manner constitute carte blanche to the nationals of one country to enter and work in the host country with no conditions other than employers be nationals of the other country."

Isao Yamada entered the United States under Section 101(a)(15)(H)(iii) which provides:

> (H) "An alien having a residence in a foreign country which he has no intention of abandoning * * * (iii) who is coming temporarily to the United States as an industrial trainee;"

On December 11, 1958, upon application, his status was changed to that of treaty investor under Section 101(a)(15)(E)(ii). This application was granted on the representation that Three Star Products, Ltc., was qualified as a treaty investor. The application for extension submitted on December 7, 1962, was denied on the basis that Three

Star Products, Ltd., does not qualify as a treaty investor (R., p. 161).

Title 22 CFR 41.41 states in part that an alien shall be classified as a nonimmigrant treaty investor if he establishes to the satisfaction of the consular officer that he qualifies under the provisions of Section 101(a)(15)(E)(ii) of the Act; that: (3) he is employed by a treaty investor in a responsible capacity and the employer is a foreign person or organization of the same nationality as the applicant. Title 22 CFR 41.41 further states "and he intends to depart from the United States upon termination of his status, and (2) he is an alien <u>who</u> has invested or is investing capital in a bona fide enterprise and is not seeking to proceed to the United States in connection with a marginal enterprise solely for the purpose of earning a living."

Petitioners' first argument is that under the treaty "extensions of stay is not necessary." The District Director having "granted the nonimmigrant status of a responsible employee of a treaty investor

(E2 status) under the said treaty, their status having been determined, they are thereafter privileged to remain in the United States so long as they maintain their status under the Treaty."

The E2 status was erroneously allowed under the statute and the treaty. Petitioners originally were admitted pursuant to the Immigration Act (Section 101(a)(15)(H)(iii) and the applicable regulations. Application was then made for change of status to nonimmigrant 101(a)(15)(E)(ii). There is no provision in the treaty for any change of status, nor for the manner in which an application for change could be made. The application could be acted upon only under the statute and the regulations.

Reference is here made to the Pre-Decision Brief of the Acting Trial Attorney (R., pp 42-62), and to the Service representative's Memorandum of Law (R., pp 9-20), which fully presented this issue of the case to the Special Inquiry Officer and the Board of Immigration Appeals.

The Board of Immigration Appeals (R., p. 4) stated the following:

> "Our study of the treaty between the United States and Japan leads us to the conclusion that the agreement was a self-executing document."

It is difficult to consider this document as "self-executing" to the exclusion of implementation by statute and regulations. Necessarily, the treaty requires the Immigration and Nationality Act and the regulations to provide the framework within which the Treaty could be effected.

The Board went on to say (R., p. 4):

> "However, in one of the landmark cases in the United States it was held that a self-executing treaty supercedes an earlier act of Congress only insofar as it is inconsistent therewith. Cook v. United States, 288 US 102). Also in the case of John T. Bill Co. v. United States, 104 F.2d 67 [Custom and Patent Appeals], the Court stated: 'It is equally well established that repeals by implication are not favored and that in the case of treaties, as in the case of statutes, where provisions "cover, in whole or in part, the same matter, and are not irreconcilable, the duty of the court - no purpose to repeal being clearly expressed or indicated - is, if possible, to give effect to both"'.

> "These two cases together with innumerable others stress the point that prior acts of Congress are not to be superceded by treaties unless the history of the treaty and the very language of such treaty together with any intentions specified have indicated abrogation of prior federal legislation. The treaty involved herein expresses no such intent nor is there anything in its history, preamble, articles or protocol showing any basis for a conclusion that the I&N Act of 1952 was to be superceded. As a matter of fact Article I(c) in referring to the entry of treaty traders and treaty investors into the United States states 'subject to laws relating to the entry and sojourn of aliens' and therefore is specifically indicative of such lack of intent."

The Board concluded (R., p. 5):

> "Accordingly, we believe that the I&N Act of 1952 together with the implementing regulations must decide the issue as to whether or not the respondents are deportable as charged."

The employer of petitioner Isao Yamada is the Three Star Products, Ltd., a corporation organized in Hawaii, presently having a majority of its stock owned by Japanese nationals who are permanent residents of the United States. All of its manufacturing and selling is done in Hawaii. The corporation has

never claimed to be within the Treaty as a treaty investor, in fact such status was specifically disclaimed. (R., pp 201-210.)

The Board of Immigration Appeals held the charge also sustainable as against the wife and minor petitioner. These two petitioners were admitted as nonimmigrants, authorized to stay in the United States for a specific period of time. Their applications for extension were denied, and they have remained thereafter without authority.

II

A Labor Clearance is necessary to accord full consideration to the petition for classification as First Preference Immigrant.

As previously stated, the petition for classification as First Preference Immigrant was filed by Three Star Products, Ltd., in behalf of Isao Yamada. The District Director's denial was based on petitioner's failure to

present a United States Employment Service Clearance Order. (R., p. 258, p. 246).

Petitioner's argument here was also presented to the Regional Commissioner on appeal, and was given thorough consideration. (R., pp 228-233.) The Regional Commissioner's Opinion and Order is attached hereto as Annex I, and is embraced without further discussion as completely responsive to petitioner's contentions.

The Regional Commissioner (R., p. 232) has called attention to the requirement of Section 212(a)(14) (8 USC 1182(a)(14) of the Act, as amended by P.L. 89-236, Section 10.

P.L. 89-236, page 7:

> "Sec. 10. Section 212(a) of the Immigration and Nationality Act (66 Stat. 182; 8 USC 1182) is amended as follows:
>
> (a) Paragraph (14) is amended as follows:
>
> 'Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing,

"qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 101(a)(27)(A) (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in section 203(a)(3) and (6), and to nonpreference immigrant aliens described in section 203(a)(8);"

Page 3, PL 89-236:

"Sec. 203(a)(8) * * * *
No immigrant visa shall be issued to a nonpreference immigrant under this paragraph, or to an immigrant with a preference under paragraph (3) or (6) of this subsection, until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 212(a)(14)."

Absent a savings clause in the statute, the decision of the District Director would be subject to the statute as amended.

Fassilis v. Esperdy, 2 Cir.
301 F.2d 429

Patsis v. I&NS, 8 Cir.
337 F.2d 733
cert. den. 380 US 952

Ziffrin v. U. S.,
318 US 73

CONCLUSION

It is respectfully submitted:

1. Petitioners Yamada failed to file their petition for review in this Court within six months of the dismissal of the appeal by the Board of Immigration Appeals.

2. The Special Inquiry Officer and the Board of Immigration Appeals had jurisdiction to review the denial by the District Director of

Section 101(a)(15)(E)(ii) status to petitioners, and of further extensions of stay.

3. The Board of Immigration Appeals properly affirmed the decision of the Special Inquiry Officer, and dismissed the appeal.

4. The outstanding order of deportation of petitioners is valid, and the decision of the Board of Immigration Appeals should be affirmed.

5. The District Director properly denied the application of Three Star Products, Ltd., in behalf of Isao Yamada for first preference classification.

Respectfully submitted:

CECIL F. POOLE
United States Attorney

By: ______________________
CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Attorneys for Respondent

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

CERTIFICATE OF SERVICE BY MAIL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 21,049

The undersigned hereby certifies that he is an employee in the Office of the United States Attorney for the Northern District of California, and is a person of such age and discretion as to be competent to serve papers.

That on December 2, 1966 he served a copy of the attached RESPONDENT'S BRIEF by placing said copy in a penalty airmail envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States mail at 450 Golden Gate Avenue, San Francisco, California.

ADDRESSEE: Attorney for Petitioner:

ROBERT WON BAE CHANG, Esq.
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318 First National Bank Building
Honolulu, Hawaii 96813

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

SOUTHWEST REGIONAL OFFICE
TERMINAL ISLAND
SAN PEDRO, CALIFORNIA 90731

PLEASE ADDRESS REPLY TO

AND REFER TO THIS FILE NO.

March 2, 1966

E NO: A11 769 844 - Honolulu

RE: Three Star Products, Ltd., petitioner in behalf of Isao Yamada

PLICATION FOR CLASSIFICATION OF BENEFICIARY UNDER SECTION 203(a)(6) OF
IMMIGRATION AND NATIONALITY ACT FORMERLY SECTION 203(a)(1)

BEHALF OF PETITIONER: Robert Won Bae Chang
Attorney at Law
318 First National Bank Building
Honolulu, Hawaii

SCUSSION: This is an appeal from the District Director's order denying petition on the ground that the petitioner has not established an gent need for the services of the beneficiary.

itioner is a business organization engaged in food processing, manu-cturing and distributing primarily in perishable vegetables. The firm, ablished in 1943, employs an average of ten workers and has gross ual sales of from $140,000 to $150,000. Petitioner seeks the benefi-ry's services as manager of operations and vice president.

eficiary, a 42-year-old married male, native and citizen of Japan, ered the United States on June 8, 1957 as an industrial trainee. eficiary's wife and son, both citizens of Japan, entered the United tes on July 15, 1960 as nonimmigrants. On January 15, 1965 the Board Immigration Appeals dismissed the family's appeal from the Special uiry Officer's order finding them in the United States in violation the terms of their admission and granting voluntary departure with an ernate order of deportation. Pending the outcome of the instant appeal family's departure from the United States has not been required.

District Director's order of denial is based on the petitioner's ilure to present a United States Employment Service clearance order for position petitioner seeks to fill. Since counsel in his brief presents veral points for consideration, it would be well at this point to present following brief chronology of events in this case:

March 26, 1965 - Petition filed to classify the beneficiary as a first preference alien under Section 203(a)(1)(A) of the Immigration and Nationality Act.

ANNEX NO. 1

April 16, 1965 - Petition returned to petitioner for compliance of the following: (1) Submit a United States Employment Service clearance order, as explained in item 4 of the instructions (on the petition); (2) Complete item 40 of page 4 (on the petition); (3) Follow items 5 and 7 of the instructions (on petition) concerning documentary evidence to establish eligibility (of beneficiary).

May 27, 1965 - Counsel applied to Employment Service, Honolulu, Hawaii for a clearance order and returned the petition to the Service without the requested evidence of beneficiary's qualifications.

June 1, 1965 - Employment Service informed counsel that due to the nature of the request involved that agency could take no further action in the case.

June 6, 1965 - Counsel requested a waiver of the clearance order based on the response received from the Employment Service.

June 25, 1965 - District Director denied the petition on the ground that since the required clearance order had not been submitted, an urgent need for the beneficiary's services had not been established. Counsel's request for waiver of the clearance order was denied.

July 1, 1965 - Counsel submitted motion to reconsider the denial on the basis that further inquiry would be made to the Employment Service in an effort to obtain a clearance order.

July 14, 1965 - District Director granted counsel's motion to reopen and reconsider the petition and granted until August 9, 1965 for submission of additional evidence or argument.

August 6, 1965 - District Director granted counsel's request of July 31, 1965 for additional time within which to submit evidence and the date was extended to the requested August 27, 1965.

August 26, 1965 - Employment Service advised counsel that there would be a delay in acting on his request for a clearance order.

September 3, 1965 - District Director granted counsel's request of August 26, 1965 for additional time within which to submit evidence and date was extended to October 15, 1965 within which to submit the required clearance order.

October 25, 1965 - Counsel advised that the Employment Service letter of June 1, 1965, supra, was considered by the petitioner

as authority for the Service to waive the clearance order. Counsel, in effect, requested that the petition be adjudicated on the record.

November 15, 1965 - Employment Service informed the Service that in their opinion petitioner's position of operations manager can be filled by local manpower within a relatively short training period and for this reason declined to initiate a clearance in the case.

November 30, 1965 - District Director denied the petition on the ground that the petitioner failed to establish urgent need for the services of the beneficiary. The District Director's denial was based on the petitioner's failure to present a clearance order and the Employment Service's statement that the position can be filled by local manpower within a relatively short training period.

December 13, 1965 - Counsel submitted the instant appeal and on December 21, 1965 the District Director granted counsel until January 20, 1966 to submit his brief. The brief was submitted January 19, 1966.

will be noted that the petition was filed, considered and denied under ction 203(a)(1)(A) of the Immigration and Nationality Act and relating gulations as they existed prior to December 1, 1965. The regulation in fect at the time the petition was filed and adjudicated read as follows:

8 CFR

204.2 Services needed urgently; clearance order. In order for the services of an alien to be considered as needed urgently within the meaning of section 203(a)(1) of the Act, it must be established that there is an immediate need for the services of the alien and qualified persons are not available in the United States to perform such services. A United States Employment Service clearance order concerning nonavailability of qualified persons shall be attached to every submitted first-preference petition unless the petitioner has been informed by the office having jurisdiction over the place where the beneficiary's services are to be performed that a clearance order for the beneficiary's occupation is not required. A single clearance order for a specified number of first-preference petitions may be used to support the identical number of such petitions filed by the same petitioner in behalf of beneficiaries who will do the work described in the clearance order.

(This regulation was effective from August 21, 1964 to November 30, 1965).

103.2 Applications, petitions, and other documents--(a) General. Every application, petition, or other document submitted on a form prescribed by this chapter shall be executed and filed in accordance with the instructions contained on the form, such instructions being hereby incorporated into the particular section of the regulations requiring its submission.......

ounsel on appeal contends that the District Director erred in denying
he petition on the ground that an Employment Service clearance order
as not submitted by the petitioner and submits that the petitioner's
eed for the beneficiary's services should be decided by the District
irector on the evidence submitted.

n support of his contention that a clearance order is simply one of
any evidentiary factors to be considered by the District Director in
his type case, counsel cites the court's statement on this point in
he case of Flower Furniture Manufacturing Corporation vs. P. A. Esperdy,
29 F.Supp. 182 at 185. We have no quarrel with counsel on this point.
e do note, however, that in the Flower case a clearance order was sub-
itted and that the court found that the Service acted pursuant to
tatutory authority and resolved issues of fact against the plaintiff
pon the basis of substantial evidence. The regulation in effect at
he time the instant petition was filed required the submission of a
learance order unless the petitioner has been informed by the office
aving jurisdiction over the place where the beneficiary's services
re to be performed that a clearance order for the beneficiary's
ccupation is not required. The record establishes that petitioner
nd counsel were informed by the appropriate Service officer that a
learance order was required in connection with the petition. In
nother decision involving this point, (requirement that a clearance
rder be submitted) the Seventh Circuit on May 26, 1964 held to be
ithout merit plaintiff's contention that the Service erred in requiring
hat a clearance order be submitted. The Court went on to say that the
ervice had no choice but to follow the regulation in this respect.
iftos vs. Immigration and Naturalization Service, 332 F.2d 203.

ounsel contends that the normal procedure for the District Director
o follow in a case such as this is to interview the petitioner, and
ake a statement concerning the petition, and conduct an investigation
he results of which would be made known to the petitioner in order for
he latter to collect additional facts so that all would be available
or a proper decision. Counsel submits that none of this was done and

'or this reason the District Director had insufficient facts upon which o decide the petition.

ounsel cites several administrative decisions with the contention that he petition of his client should be considered in their context and ranted. Again we have no quarrel with counsel concerning his citations. owever, in reviewing the cases cited by counsel (5 I. & N. Dec. 527 and 29, 7 I. & N. Dec. 292), it is noted that in all but one case it is pecifically mentioned that a clearance order was presented with the etition. In the exception (5 I. & N. Dec. 527), it is stated in the ecision that "the petitioner has complied with the applicable statutes nd regulations."

he regulations in effect at the time the petition was filed and adjudiated required that a clearance order be filed with a first preference isa petition unless the appropriate Service office informed the petitioner hat it was not required for the beneficiary's occupation. The petitioner n the instant case was informed that a clearance order was required. ince no clearance order was submitted, the District Director had no lternative but to deny the petition. Counsel's contentions that the istrict Director erred in denying the petition solely on this ground s without merit and must be dismissed.

n his brief counsel points out that the words "urgent need" have been eleted from Section 203 of the Immigration and Nationality Act as amended y the Act of October 3, 1965 and states that it was Congressional intent hat what was done under the old law with respect to urgent need is not a roper basis for granting or denying first preference quota. He urges hat the District Director was aware of this change at the time his ecision was made in the instant case and therefore the denial was in rror. What counsel says about deletion of the words "urgent need" is rue, however, this was not effective until December 1, 1965 and as eretofore stated this case was decided on November 30, 1965 after counsel ad been granted an extended period of time within which to support the etition with a clearance order. The District Director's decision was roper since it was rendered under the statute and regulations then in ffect.

etitions filed under former Section 203(a)(1)(A) of the Act have, since ecember 1, 1965, been considered under subsections (3) and (6) of Section 03(a) of the amended Act. What counsel has perhaps overlooked is the new equirement in Section 212(a)(14) of the amended statute that a "certifiation" from the Secretary of Labor is required for aliens seeking classiication as members of the professions or because of their exceptional bility in the sciences or the arts under subsection (3), or skilled or nskilled workers under subsection (6) of Section 203(a). New regulations

relating to this "certification" requirement are found in 8 CFR 204 and 29 CFR 60. It will be noted in the new regulations that there is no appeal from a decision denying a petition for the lack of a "certification" by the Secretary of Labor.

This case, including the points raised by counsel in his brief, has been carefully considered. It is concluded that the District Director had no alternative but to deny the petition. Absent a clearance order from the United States Employment Service the petition was not approvable under the statute or regulations in existance prior to December 1, 1965 nor is it approvable under the amended statute and regulations without a "certification" from the United States Employment Service. The appeal will be dismissed.

ORDER: IT IS ORDERED that the appeal be and the same is herewith dismissed.

Harlon B. Carter
REGIONAL COMMISSIONER
Southwest Region